

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

IN RE FABIAN HERNANDEZ,
APPLICANT

RECEIVED
COURT OF CRIMINAL APPEALS
3/20/2020
DEANA WILLIAMSON, CLERK

CAUSE NO.

MOTION TO STAY EXECUTION

Mr. Hernandez, through undersigned counsel, respectfully moves this Court to stay his execution, currently scheduled for April 23, 2020.

The current health crisis, the enormous resources needed to address the emergency and the inability to provide Mr. Hernandez an objectively reasonable standard of representation at this time require that Mr. Hernandez's execution be stayed.

In considering whether this application is ripe at this time, this Court is asked to consider not only the execution date of April 23, 2020 but also the deadline of March 31, 2020 for filing any clemency application and the need to complete work necessary for any successive litigation well ahead of the execution date.

I. Mr. Hernandez's execution date should be stayed at the present time in light of the current health crisis and the enormous resources needed to address that emergency

In the last three days, in response to the unprecedented public health emergency facing this country and this state, this Court has stayed two pending executions set for March 18 and March 25 respectively. *In Re John William Hummel*, No. WR-81,578-02 (Tex. Crim. App. March 16, 2020)(not for

publication)(“the execution should be stayed at the present time in light of the current health crisis and the enormous resources needed to address that emergency.”); *In re Tracy Beatty*, No. WR-59,939-04 (Tex. Crim. App. March 19, 2020)(not for publication) (“the execution should be stayed at the present time in light of the current health crisis and the enormous resources needed to address that emergency.”)

Given the scope of the crisis and its trajectory the same logic applies even more forcefully to this request for a stay of Mr. Hernandez’s current execution date.

Mr. Hernandez’s current execution date is within that same sixty-day period embargoed by this court in *Hummel* and *Beatty* and should similarly be stayed.

To expand upon this court’s decisions, the rapidly spreading coronavirus is producing an unprecedented crisis in this country, and in Texas.

On March 11, 2020, the World Health Organization officially declared that the novel coronavirus outbreak had become a pandemic.¹

On March 13, 2020, President Trump declared a national emergency, commencing March 1, 2020.²

¹ See Jamie Gumbrecht & Jacqueline Howard, *WHO declares novel coronavirus outbreak a pandemic*, CNN (Mar. 11, 2020), <https://www.cnn.com/2020/03/11/health/coronavirus-pandemic-world-health-organization/index.html>.

² <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>

That same day, Governor Abbott declared a state of disaster in Texas.³

On March 17, 2020, and based on data that was already old, the Centers for Disease Control are reporting that there are 4,226 cases in the U.S., with 67 of those cases in Texas.⁴ Local media reported on March 17, 2020 that the number in Texas had reached 76, with one fatality.⁵

The Texas Department of Health and Human Services is reporting that cases have been detected in El Paso County⁶ and El Paso City Council has closed many businesses and banned gatherings of more than 50 people, with the CDC lowering its recommendation to gatherings of ten people or less.⁷

On March 17, 2020, Governor Abbott activated the National Guard in response to the emergency.⁸

On March 18, 2020, the Surgeon General warned all Americans that each of us “should be acting as if we have the virus.”⁹

³ <https://gov.texas.gov/news/post/governor-abbott-declares-state-of-disaster-in-texas-due-to-covid-19>.

⁴ <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>

⁵ <https://www.texastribune.org/2020/03/17/coronavirus-updates-texas-austin-leaders-bar-restaurant-closures/>; <https://www.texastribune.org/2020/03/17/texas-coronavirus-cases-prompt-greg-abbott-activate-national-guard/>.

⁶ <https://www.dshs.state.tx.us/news/updates.shtm#coronavirus>.

⁷ <https://www.texastribune.org/2020/03/17/coronavirus-updates-texas-austin-leaders-bar-restaurant-closures/>.

⁸ <https://gov.texas.gov/news/post/governor-abbott-activates-national-guard-in-response-to-covid-19>.

⁹ <https://www.cnn.com/world/live-news/coronavirus-outbreak-03-18-20-intl-hnk/index.html>.

The virus has been described by world leaders and academics as a once-in-a-hundred year event¹⁰ and the worst global health threat we have faced in a century.¹¹

The pandemic is affecting every aspect of daily functioning—including in the criminal justice system. Each day, each hour, increases the number of people and systems effected. Leaders across Texas have taken extraordinary measures to reduce the risk of transmission. Colleges and universities have extended spring break periods and moved to online-only courses; major public events have been cancelled; and officials in places like Houston have declared public health emergencies.¹²

The Office of Court Administration distributed a letter on March 12, 2020, warning that “the information on novel coronavirus (COVID-19) is changing rapidly, and the situation is becoming more concerning in the state and United States.”¹³ It advises that “Courts should schedule or suspend proceedings to avoid the gathering of large groups of people until at least April 1, including jury trials and large docket calls.” *Id.*

¹⁰ <https://www.reuters.com/article/us-health-coronavirus/stunned-world-grapples-with-once-in-100-year-coronavirus-battle-idUSKBN21522O>.

¹¹ <https://www.cnn.com/videos/tv/2020/03/15/yuval-noah-harari-amanpour-cnn-coronavirus.cnn>.

¹² *See Coronavirus updates in Texas: UT-Austin closes sporting events to fans, Trump bans some inbound travel, and more*, TEXAS TRIBUNE (Mar. 11, 2020) <https://www.texastribune.org/2020/03/11/coronavirus-texas-updates-community-spread-school-cancellations/>.

¹³ <https://www.txcourts.gov/media/court-procedures-for-the-2019-novel-coronavirus-covid-19/>.

On March 13, 2020, the TCCA and Texas Supreme Court issued an emergency order requiring courts to modify or suspend any and all deadlines or procedures “to avoid risk to court staff, parties, attorneys, jurors, and the public.”¹⁴ That order remains in place until May 8, 2020. This order alone requires that the execution be stayed.

On March 13, 2020, the TDCJ suspended prison visitation statewide, including to death row.¹⁵ The head of the National Institute of Allergy and Infectious Diseases told Congress earlier this week: “The bottom line is it’s going to get worse.”¹⁶

In *Hummel*, this court stayed the execution based purely upon the health crisis, the resources it requires and the inappropriateness of pursuing an execution, with all it entails, in these circumstances.

Notably, in Mr. Hernandez’s case, the argument for a stay is even stronger than in *Hummel*. Hummel had already been denied his successive application and his clemency petition and had neither proceedings pending nor work waiting to be performed when the TCCA acted. In Mr. Hernandez’s case, as described below, he

¹⁴ <https://www.txcourts.gov/media/1446056/209042.pdf>.

¹⁵ <https://www.chron.com/news/houston-texas/article/TDCJ-jail-visitation-suspended-coronavirus-Houston-15129543.php>.

¹⁶ See Kenya Evelyn & Julian Borger, *US coronavirus death toll rises to 37 as official warns ‘things will get worse’*, The Guardian (Mar. 11, 2020), <https://www.theguardian.com/world/2020/mar/11/us-coronavirus-death-toll-states-total-cases>.

is at the critical point of having both clemency and a successor application developed but his counsel is unable to perform the most basic of tasks to complete this essential work.

II. The process of execution represents a significant and unreasonable risk in the current emergency and is contrary to the directions of our political leadership, the courts and the medical and scientific communities

The act of carrying out Mr. Hernandez's execution may itself assist in spreading COVID 19. Without question, executions are solemn and stressful affairs, requiring a number of state employees to carefully observe the comprehensive governing protocols. Members of the execution team¹⁷ who may feel compelled to attend notwithstanding known risks they have been exposed to or who may be carrying the virus, endanger every other person present in and around the Huntsville Unit. Each of those people then risks bringing the virus home to their families and loved ones. The OCA admonishes: "Courts should be mindful of the need to reduce the impact of the virus on parties, jurors, the public, judges, and staff." (*supra*) The TCCA has ordered that courts "must, to avoid risk to court staff, parties, attorneys,

¹⁷ The execution process itself requires the participation of particular individuals. Members of the execution and tie down team (specifically trained and not replaceable by just any TDCJ personnel), the medically-trained individual who inserts the I.V. line, the person who declares death, and the people injecting the lethal drugs, are all pivotal to the process. *See* Texas Department of Criminal Justice Execution Procedure (Apr. 2019)

jurors, and the public” modify and suspend any and all deadlines or procedures. (*supra*)

Executions also involve a substantial number of people functioning in various roles: the sentenced individual who is to be executed; correctional officers; a spiritual adviser; family members or other close friends of the person being executed; lawyers for the condemned; lawyers for the State of Texas and the TDCJ; prison officials; the team of individuals trained to restrain the prisoner and administer the lethal injection, including physicians; members of the victim’s family or other close friends of the victim; members of the media; and other witnesses and people present in and around the execution facility.¹⁸ Gathering all of these people in one location presents a substantial risk of transmission if anyone happens to be infected.¹⁹ The prosecuting county, El Paso County, already has three confirmed cases of the disease. For a range of reasons, prisons are environments particularly susceptible to the rapid spread of an easily-communicable disease like the novel

¹⁸ See generally TEX. CODE CRIM. PROC. ARTS. 43.14-43.26; 37 TEX. ADMIN. CODE § 152.51 (detailing authorized witnesses to an execution); TDCJ Execution Procedure (Apr. 2019).

¹⁹ One of the most troubling features of the novel coronavirus is that someone may be infected or carrying it for up to two weeks without realizing he is ill. See, e.g., Stephanie Pappas, *If you have the coronavirus, how long before symptoms show up?*, LIVE SCIENCE (Mar. 3, 2020), <https://www.livescience.com/coronavirus-incubation-period-when-symptoms-appear.html> (“health officials estimate an incubation period of between one and 14 days”)

coronavirus.²⁰ Introducing unnecessary risks endangers everyone present, not only inmates but also staff—and in the case of an execution, all of the additional witnesses and parties involved.²¹

Postponing the date now alleviates any pressure to see through an execution that should not happen because of the health risks. If TDCJ ultimately postponed the execution on the date it was scheduled, the exposure and transmission risks would still materialize because witnesses, prison staff, lawyers, and others would still travel to the Unit and convene in one place.

²⁰ See, e.g., Rich Shapiro, *Coronavirus could ‘wreak havoc’ on U.S. jails, experts warn*, NBC News (Mar. 12, 2020), <https://www.nbcnews.com/news/us-news/coronavirus-could-wreak-havoc-u-s-jails-experts-warn-n1156586>; Keri Blakinger & Beth Schwartzapfel, *When Purell is Contraband, How Do You Contain Coronavirus?*, THE MARSHALL PROJECT (Mar. 6, 2020), <https://www.themarshallproject.org/2020/03/06/when-purell-is-contraband-how-do-you-contain-coronavirus>.

²¹ The OCA’s admonition, *see supra*, is well supported. Given recent indications that “community spread” of coronavirus is occurring here in Texas, the transmission risks accompanying an execution sufficiently justify a cautious approach at this juncture. See, e.g., Todd Ackerman & Nicole Hensley, *‘The tip of the iceberg’: Coronavirus ‘community spread’ has started in Houston area*, HOUSTON CHRONICLE (Mar. 11, 2020), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Montgomery-County-patient-is-first-Houston-area-15123593.php>; Megan Menchaca & Allyson Ortegon, *Here’s how many coronavirus cases there are in Texas—and everything else you need to know*, TEXAS TRIBUNE (Mar. 2, 2020; updated 11am on Mar. 12, 2020), <https://www.texastribune.org/2020/03/02/coronavirus-texas-cases-latest-updates-san-antonio/> (“And officials in Montgomery County said March 11 they had identified a patient with coronavirus who doesn’t have any recent travel history, meaning community spread of the disease could be in Texas. The Centers for Disease Control and Prevention defines community spread as the ‘occurrence of cases for which the source of infection is unknown.’”).

This State has put an execution on hold in the midst of a broader emergency before. On September 11, 2001, the State planned to execute a man named Jeffery Tucker. After the terrorist attacks occurred that morning, Governor Rick Perry granted a 30-day reprieve to ensure Mr. Tucker was not executed at a time when the justice system was not functioning normally.²² More recently, when Hurricane Harvey struck in 2017, a court in Bexar County withdrew an order setting an execution date for Juan Castillo on the State's motion, because the defense attorney resided in a county in which Governor Abbott had declared a state of disaster.²³ In light of the risks both to the orderly functioning of the criminal justice system and to the public posed by the novel coronavirus pandemic, the Court should stay Mr. Hernandez's execution pending further order.

²² See *Texas death row inmate Jeffery Tucker executed*, HOUSTON CHRONICLE (Nov. 14, 2001), <https://www.chron.com/news/houston-texas/article/Texas-death-row-inmate-Jeffery-Tucker-executed-2059983.php> (“Government offices, including the federal courts, were shut in the immediate response to the attacks on New York and Washington Sept. 11, the same day Tucker had been scheduled for lethal injection. Gov. Rick Perry gave Tucker a 30-day reprieve, fearing the courts would not be able to respond that day to any 11th-hour plea from attorneys for the condemned man.”).

²³ See, e.g., Respondent's Motion to Withdraw Order of Court Setting a Date for Execution in Death Penalty Case, No. 2004-CR-1461-A (186th Judicial District, Bexar County) (Aug. 30, 2017); Order Setting Execution Date (Aug. 30, 2017).

III. Mr. Hernandez's execution should be stayed because he cannot receive an objectively reasonable standard of representation as he seeks relief from his impending execution

Following exhaustion of a single round of review of a conviction and death sentence, counsel for a condemned prisoner must immediately consider the availability of any further legal avenue of review – a state or federal successive application – as well as developing and presenting a request for clemency. 18 U.S.C.S. § 3599(e); *Harbison v. Bell*, 556 U.S. 180 (2009); *Guidelines and Standards for Texas Capital Counsel*, Guideline 12.2.

A. Clemency

With the current execution date, Mr. Hernandez's clemency petition must be filed no later than March 31, 2020.

Counsel for Mr. Hernandez have begun work on a clemency petition, have developed an action plan for work to be done to prepare that petition and are in the process of seeking a budget and funding for the necessary legal work as well as funding for the investigative work and expert assistance required. An investigator has been engaged (but not yet funded) and possible experts identified.

Consistent with prevailing professional standards, the plan for Mr. Hernandez's clemency petition involves numerous elements of field investigation and the use of experts that are wholly foreclosed as a result of the current pandemic. Further, even the capacity to complete the purely desk-based aspects of the

development of the petition are severely hampered by the restrictions and diversion of resources caused by the pandemic. Finally, there is no reasonable prospect of an adequate presentation or consideration of any clemency petition in the present circumstances.

The Texas State Bar Associations *Guidelines and Standards for Texas Capital Counsel* set out specific duties for clemency counsel at Guideline 12.2(C.). Those Guidelines describe in detail the necessary investigation, including specific admonitions as to the need to: conduct an investigation of the guilt-innocence phase evidence, in which the “assistance of a fact investigator with specialized training is indispensable.”;²⁴ conduct a mitigation investigation including a defense team member qualified to screen for mental or psychological disorders and utilizing an independent mitigation specialist as a member of the defense team;²⁵ ; obtain the investigative resources necessary, including a fact investigator, a mitigation specialist as well as any appropriate experts;²⁶ and, maintain adequate client communication.²⁷

The Guidelines specifically require counsel to seek appropriate redress where the process governing consideration of the client’s clemency application will not be

²⁴ Guideline 12.2(B)(4).

²⁵ Guideline 12.2(B)(5).

²⁶ Guideline 12.2(B)(3).

²⁷ Guideline 12.2(B)(2).

substantively and procedurally just.²⁸ Not through the fault of any person in our criminal justice system but as a result of the enormous health crisis we now face, it is certainly the case that moving forward with clemency proceedings now would be substantively and procedurally unjust.

The Texas Capital Guidelines reflect, and in some respects expand upon, the American Bar Associations Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003) (“ABA Guidelines”). These Guidelines set forth the “reasonable” professional “standards for capital defense work” at this time and they are the “standards to which [the Supreme Court] long ha[s] referred as ‘guides to determining what is reasonable’” under the Sixth Amendment. *Wiggins*, 539 U.S. at 522-25 (citing *Strickland*, 466 U.S. at 288; *Williams*, 529 U.S. at 396); accord *Rompilla*, 545 U.S. at 387. Thus, the nationally prevailing standards and constitutional benchmarks for adequate performance require the work intended by counsel but foreclosed by the current state of emergency.

The American Bar Association’s Capital Clemency initiative has developed a 144-page Practitioner’s Toolkit, describing the work that must be performed in competently developing a clemency petition. Without belaboring the point or becoming so specific as to reveal defense strategy, consistent with the prevailing advice contained in the Toolkit, clemency counsel must undertake multiple levels of

²⁸ Guideline 12.2.(C)(4).

field investigation and fact development in order to develop and prepare an adequate clemency application. This process is currently foreclosed.

In Mr. Hernandez's case, the post-conviction investigation of guilt-innocence phase issues and mitigation issues left a number of important stones unturned. In light of 28 U.S.C.S. §2254(d) and the Supreme Court's guidance in *Cullen v. Pinholster*, the federal habeas proceedings did not produce any of the additional investigation as to guilt-innocence or mitigation necessary for a competent clemency application.

Thus substantial investigation remains to be completed at the clemency stage.

As of writing there is no capacity to conduct that investigation in light of the directions from our political, medical and scientific leadership. Nor would it be ethical or responsible from a public health stand point to conduct field investigation at the present time. Finally, as a matter of professional judgment, it would be grossly negligent to attempt field investigation at this time, given the likely unwillingness of relevant witnesses to respond favorably at this time.

Similarly, it is impossible to engage and utilize an appropriate expert at this time as client visitation has been suspended.

B. Successive applications

Counsel also have an obligation to pursue all available legal avenues for relief for Mr. Hernandez, including representing him in "every subsequent stage of

available judicial proceedings . . . [including] . . . all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures.” 18 U.S.C.S. § 3599(e); *Harbison v. Bell*, 556 U.S. 180 (2009).

Counsel has been diligently conducting research in this respect and has identified at least one substantial and meritorious successive application that must be brought and may reasonably be anticipated to result in relief for Mr. Hernandez.

However, that successive application cannot be adequately developed without the conduct of field investigation by a qualified mitigation specialist and the engagement and services of an appropriate expert. As described above, it is simply impossible to complete this work in the present state of emergency.

Adequate development of the successive application would also require substantial contact with the client, Mr. Hernandez, which is currently foreclosed as a result of the current emergency.

Thus, in the state of emergency in which we presently find ourselves it is literally impossible to provide Mr. Hernandez with the representation and advocacy to which he is entitled and a stay of execution is required to avert a denial of his substantial and procedural Due Process rights, his rights to counsel and to access to courts and his right to be free from cruel and unusual punishment. Similarly, this court’s jurisdiction, including its ability to consider and act on a meritorious

application for relief is thwarted by the extraordinary emergency which impairs counsel, and perhaps even the operation of this court.

IV. As this is a death case, special considerations apply requiring a stay of execution

The Eighth Amendment requires a heightened need for reliability in the determination that a death sentence is the appropriate punishment in a specific case. *Caldwell v. Mississippi*, 472 U.S. 320, 323, 341 (1985); *Monge v. California*, 524 U.S. 721, 732 (1998) (Court has “recognized an acute need for reliability in capital sentencing proceedings”).

This is a function of the qualitative difference between a death sentence and even the longest term of imprisonment, which requires a corresponding difference in the need for reliability in capital cases. *Lockett v. Ohio*, 438 U.S. 586, 603 (1978).

Capital proceedings must be policed at all stages by an “especially vigilant concern for procedural fairness and for the accuracy of factfinding.” *Monge*, 524 U.S. at 732 quoting *Strickland v. Washington*, 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part)).

Capital cases require heightened procedural protections and, by their nature, justify a departure from the courts’ usual practice in non-capital cases. “Time and again the [Supreme] Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case. See, e. g., *Bullington v. Missouri*, 451 U.S. 430 (1981); *Beck v. Alabama*, 447 U.S. 625 (1980); *Green v. Georgia*, 442 U.S.

95 (1979) (*per curiam*); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Gardner v. Florida*, 430 U.S. 349 (1977); *Woodson v. North Carolina*, 428 U.S. 280 (1976).” *Barefoot v. Estelle*, 463 U.S. 880, 913-914 (1983) (Marshall J., dissenting).

Furthermore, “the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.” *Caldwell*, 472 U.S. at 329.

In light of the heightened concern for procedural fairness and adequate scrutiny of any legal claims in capital cases, the need for a stay of execution is all the more overwhelming.

CONCLUSION

For the foregoing reasons, Mr. Hernandez’s execution should be stayed.

Respectfully submitted,

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